
(2002) 04 BOM CK 0019

In the Bombay High Court

Case No : Chamber Summons No's. 1513 of 2001

Rajendra Kantilal Dalal

APPELLANT

Vs

Bombay Builders Co. (P) Ltd. and Others

RESPONDENT

Date of Decision : 15-04-2002

Acts Referred:

Specific Relief Act, 1963 — Section 19, 21

Citation : AIR 2002 Bom 408 : (2002) 3 ALLMR 10 : (2002) 5 BomCR 102 : (2002) 4 BOMLR 480 : (2002) 3 CivCC 383 : (2002) 4 MhLj 141 : (2002) 4 RCR(Civil) 389

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : C.S. Balasara, instructed by Kantilal Mehta and Co, for the Appellant; Ketan Parikh and H. Toor, instructed by Amarchand Mangaldas, for Defendant 2, for the Respondent

Final Decision : Allowed

Judgement

S.A. Bobde, J.—This Chamber Summons is taken out by the plaintiff for an amendment to the plaint according to the Schedule. Mainly by the proposed amendment the plaintiff seeks to incorporate averments to the effect that in case the Court comes to the conclusion that specific performance cannot or ought not to be granted, in addition to the refund of the sum of Rs. 1,92,000/-, the Plaintiff seeks damages and/or compensation in the sum of Rs. 5,46,000/- from the 1st and 2nd defendants. This proposed amendment for damages and/or compensation is strongly opposed by defendant No. 2 who has purchased the property from the Defendant Nos. 1 and 3.

2. Firstly, Mr. Ketan Parikh, learned Counsel for the defendant No. 2 submitted that the proposed amendment is barred by limitation since it introduces a pleading of specific performance against the defendant No. 2 and compensation in lieu thereof for the first time.

3. This takes us directly for a consideration of the question whether Section 21 of

the Specific Relief Act is attracted to the present case. If the Section applies then the amendment would not be barred by limitation. Section 21 of the Specific Relief Act reads as follows :--

"21. Power to award compensation in certain cases -- (1) in a suit for specific performance of "contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly-

(3) If, in any such suit, the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) in determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint."

It is disputed that if the plaintiff is entitled to claim compensation against Defendant No. 2 then the proposed amendment would not be barred by limitation. The submission on behalf of the Defendants is, however, that the Defendant No. 2, who has purchased the property from Defendants 1 and 3, is not a party to any contract with the plaintiff of which specific performance is sought. He is, therefore, not a party who can be said to have broken a contract and therefore, the plaintiff is not entitled to seek any compensation for that breach.

4. This submission proceeds on the assumption that in a suit specific performance can only be claimed against a party to the contract. This is not so in view of Section 19 of the Specific Relief Act, which reads as follows ;--

"19. Relief against parties and persons claiming under them by subsequent title. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -- (a) either party thereto :

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original control;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

d) when a company has entered into a contract and subsequently becomes

amalgamated with another company, the new company which arises out of the amalgamation ;

(e) when the promoters of a company have, before its incorporation entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company."

It is obvious that under this section specific performance of a contract may be enforced against not only a party to the contract under Clause (a) but also against any other party claiming under him by a title arising subsequent to the contract except a purchaser for value without notice of the original contract vide Clause (b). The question that remains to be decided is, whether a claim for compensation can be made against such another party; in the present case the Defendant No. 2.

5. There is no dispute about the position of the Defendant No. 2 i.e. that the Defendant No. 2 is a person claiming under a title arising subsequent to the contract between the plaintiff and Defendant Nos. 1 and 3.

6. Learned Counsel for the Defendant No. 2 submitted that by this amendment a wholly new case is being made out against the Defendant No, 2 since there is no prayer for specific performance against Defendant No, 2 and it is by the proposed amendment that a prayer is being introduced for the first time. That this amounts to a wholly new case being made out against Defendant No. 2 for the first time.

7. A perusal of the plaint does not support the contention of the learned Counsel for the Defendant No. 2. In paragraph 15 of the Plaint, the plaintiff has pleaded as follows ;--

"The plaintiff states that in the month of April, 1980, the work of construction had progressed well. Defendant No. 1 instead of carrying out their obligations under the said Agreement have purported to transfer the said building to Defendant No. 2. The plaintiff states that the said transfer was made mala fide and with a view to defeat the plaintiffs right."

The prayer Clause (c) of the plaint reads as follows :--

"(c) That Defendant No. 2 be ordered and specifically performing the said agreement mentioned in prayer (a) above, in terms of prayer (b) above."

8. This prayer clause is obviously made as a result of the observation of the Supreme Court in Lala Durga Prasad and Another Vs. Lala Deep Chand and Others, , in which the Supreme Court has observed in paragraphs 40 and 41 as follows at page 81 :--

"40. First, we reach the position that the title to the property has valley passed from the vendor and resides in the subsequent transferee. The sale to him is not void but only voidable at the option of the earlier "contractor". As the title no longer rests in the vendor it would be illogical from a conveyancing point of view

to compel him to convey to the plaintiff unless steps are taken to revest the title in him either by cancellation of the subsequent sale or by reconveyance from the subsequent purchaser to him. We do not know of any case in which a reconveyance to the vendor was ordered but Sulaiman C.J. adopted the other course in *Kali Charan Singh and Another Vs. Janak Deo Singh and Others*. He directed cancellation of the subsequent sale and conveyance to the plaintiff by the vendor in accordance with the contract of sale of which the plaintiff sought specific performance. But though this sounds logical the objection to it is that it might bring in its train complications between the vendor and the subsequent purchaser. There may be covenant in the deed between them which it would be inequitable to disturb by cancellation of their deed. Accordingly, we do not think that is a desirable solution.

41. We are not enamored of the next alternative either, namely conveyance by the subsequently purchaser alone to the plaintiff. It is true that would have the effect of vesting the title to the property in the plaintiff but it might be inequitable to compel the subsequent transferee to enter into terms and covenants in the vendor's agreement with the plaintiff to which he would never have agreed had he been a free agent; and if the original contract is varied by altering or omitting such terms the Court will be remaking the contract, a thing it has no power to do; and in any case it will no longer be specifically enforcing the original contract but another and different one.

42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in *Kafiladdin and Others Vs. Samiraddin and Others*, and appears to be the English practice. See *Fry on Specific Performance*, 6th Edn. page 90, paragraph 207; also -- *Potter v. Sanders* 1846J 67 R 1057. We direct accordingly."

In effect, the Supreme Court has laid down the manner in which a suit for specific performance can be decreed in favour of plaintiff against the subsequent transferee. There is no doubt that the subsequent transferee does not become a party to the contract for a specific performance. This, however, does not mean that a decree for specific performance cannot be granted to the plaintiff of his own contract merely because the vendor has transferred the property in favour of the subsequently purchaser.

9. On a plain reading of Section 13 Parliament has clearly enabled the Court to enforce the specific performance of the contract against any other person claiming under the party to the contract except where such a person is a bona fide purchaser for value without confirming the contract.

10. The question is whether in view of specific performance the subsequent

purchaser can be directed to pay compensation or in addition to the specific performance. There is no doubt that Sub-section (2) of Section 21 provides that If the Court decides the specific performance ought not to be granted but that there is a contract between the parties which has been broken by the Defendant and the Plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly. In other words the Court may decide to award compensation to the plaintiff instead of granting a decree for specific performance when there is a contract between the parties which has been broken, it is undoubtedly based on the existence of a contract which has been broken by the defendant but the object is primarily to compensate the plaintiff in lieu of specific performance. It is not possible to read into the section a bar on the power of the Court to direct a subsequent purchaser to pay such compensation to the plaintiff. This is further borne out by Sub-section (3) of Section 21 which provides for compensation to be paid to the plaintiff in addition to a decree for specific performance of the contract. There is no reference here to a contract between the parties which has been broken by the Defendant.

11. It is clear, on a combined reading of the legislative scheme of Sections 19 and 21 of the Specific Relief Act that Parliament intended that the plaintiff should be compensated where appropriate; whether in lieu of, or in addition to, specific performance. The provisions do not in any way inhibit the Court from directing the subsequent purchaser to pay such compensation. In a given case the Court can come to the conclusion that a subsequent purchaser colluded with the defendant who entered into a contract with the plaintiff, to defeat the right of the plaintiff. In such a case, the Court must have the power to direct such a subsequent purchase to pay compensation. In the present case, there is a direct allegation that the Defendant No. 2 purchased the property mala fide with a view to defeat the plaintiffs right.

12. Thus having regard to the overall legislative scheme it is clear that specific performance of a contract may be enforced against a subsequent purchaser also vide Section 19 and that in such a suit for specific performance of a contract the plaintiff may also claim compensation for its breach either in addition to or in substitution of such performance. Indeed Section 21 is made with that intention and it makes a provision to that effect in the sub-sections.

13. Learned Counsel for the defendants, however, relied on a judgment of the Allahabad High Court in Jhandoo and Another Vs. Ramesh Chandra and Others, , where the learned single judge of the Allahabad High Court (M.H. Beg, J., as he then was) in that case came to the conclusion that plaintiff had not asked specifically for compensation for the breach of any contract and has set out any ground legal or equitable for making the Defendant/Appellant responsible for making payment. That is not the case here, in this case as apparent from the relevant part of the plaint reproduced above. However, the learned single Judge in Jhando (supra) observed that the effect of Section 19 of the 1877 Act which corresponds to the Section 21 of the present Specific Relief Act, 1963 has the

following effect :--

The next part of Section 19 imposes a mandatory duty upon the Court to award compensation, whether it is asked for or not, provided three conditions are satisfied. They are, the Court must decide that specific performance ought not to be granted, there must be a contract between the parties which must have been broken by the defendant against whom the compensation is to be granted; and, the plaintiff must have proved his right to the compensation to be awarded it seems to me to be obvious that this part of Section 19 comes into play only when there is privity of contract between a party against which an order for compensation in lieu of damages for breach of contract can be passed. In fact, the compensation here spoken of is really the damage incurred by a party because the other contracting party has broken it it follows that it should be awarded only against the party which has broken it. A third party, which has not broken the contract may place itself in such a position that the contract may be specifically enforced against it as though it had entered into a contract. Nevertheless, there is no corresponding provision which would transfer the damages to be paid as compensation for breach of contract from the shoulders of the party actually responsible for the breach on to those of the party which had merely taken the benefit of that breach. To make the subsequent purchasers liable to pay damages or compensation u/s 19 of the Specific Relief Act would be nothing short of enforcing a charge upon the property purchased by them. This would, in my opinion, be illegal."

14. I am in respectful disagreement with the judgment of the learned single Judge in Jhandoo (supra) since there could well be a situation where the Court finds that the subsequent purchaser has actively colluded with the party who entered into a contract to defeat the right of the plaintiff. In such, a case, in my view, it would be perfectly equitable and legal to direct such a purchaser to pay compensation. In fact, adopting the view of the learned single Judge in Jhandoo and another (supra) would prevent a subsequent purchaser from urging that the Court may not grant specific performance of the contract but may grant compensation to the plaintiff instead. I think, the section ought not to be construed in a manner which either disables subsequent purchaser from asking the Court to grant compensation in view of specific performance or inhibit the power of the Court to do so.

15. I am, therefore, of the view that Section 21 is applicable to the case of a subsequent purchaser in view of the fact that the plaintiff is entitled to claim compensation from a subsequent purchaser. Therefore, in my view the amendment is not barred by limitation and deserves to be allowed.

16. Accordingly, Chamber Summons is allowed in terms of prayer Clause (a), which reads as follows :--

"(a) That the plaintiffs be allowed to amend the plaint as per the Schedule annexed hereto."

17. At this stage, learned Counsel for the defendants seeks a stay of the order. Admittedly, since the stage of evidence has not been reached, application for stay rejected.

18. Amendments to be carried out within a period of three weeks from today.

19. Chamber Summons disposed of accordingly. No order as to costs.

All Authorities concerned to act on a copy of this order duly authenticated by the Chamber Registrar of this Court on payment of usual copying charges.

P.A. to give ordinary copy of this order to the parties concerned.